IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

—v.—

CARL BEAZER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

DEBORAH M. GREENBERG
ERIC D. BALBER
Legal Action Center
271 Madison Avenue
New York, New York 10016

ELIZABETH BARTHOLET
MICHAEL MELSTNER
MARK C. MORRIL

Attorneys for Respondents

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JURISDICTION

A full recitation of the chronology of this case in the court of appeals raises some question regarding the time elements on which this Court's jurisdiction rests, and suggests that the petition for certiorari which was filed on April 6, 1978 may be untimely.

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 22,

1977. Pet. 1a.[1] Thirty-three days thereafter, petitioners filed a motion for enlargement of time to file a petition for rehearing. The motion was granted, and petitioners were given leave to file a petition for rehearing on or before August 8, 1977.[2] However, petitioners did not file their petition for rehearing until August 11, 1977. A timely petition for rehearing would have suspended the running of the ninety day period for filing a petition for certiorari, Department of Banking, State of Nebraska v. Pink, 317 U.S. 264 (1942), reh. denied 318 U.S. 802 (1943), but petitioners' petition for rehearing was not timely.

QUESTIONS PRESENTED

1. Should this Court review the question whether the New York City Transit Authority or its officials are subject to suit for back pay under 42 U.S.C. §1983, where the Authority is established under New York law as an independent public benefit corporation, where the back pay award is a minor adjunct to equitable relief, and

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[1] Citations in this form are to pages of the petition and the appendices thereto.

[2] Inexplicably, the order granting petitioners' motion was entered on August 11, 1977.

where the award rests on independent bases?

2. Does the award of attorneys' fees to respondents merit this Court's review, in the light of clear congressional intent to provide such awards to prevailing parties in actions brought under 42 U.S.C. §1983 against public agencies and their officials?

3. Should this Court review the rulings below that the New York City Transit Authority's policy of excluding from employment in any of its non-safety sensitive positions all present or past participants in methadone maintenance treatment programs violates the equal protection and due process clauses of the Fourteenth Amendment, where both courts below, applying the traditional, least intrusive standard of review to an extensive trial record, found that the Authority's policy bears "no rational relationship" to any of its legitimate needs?

STATEMENT

This action—brought pursuant to 42 U.S.C. §1983, the Fourteenth Amendment and Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e et seq.)[3]—challenged

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[3] Jurisdiction was invoked under 28 U.S.C. §1343, 28 U.S.C. §1331 and 42 U.S.C. §2000e5(F)(3).

the legality of the New York City Transit Authority's policy of denying employment to any person who had ever participated in a methadone maintenance treatment program. The policy was an absolute, across-the-board prohibition applying to every one of the Transit Authority's 47,000 jobs--from janitors, file clerks and secretaries to painters, plumbers, and mechanics to admittedly safety-sensitive positions. Under the policy any job applicant or current employee who was found to have a history of methadone maintenance treatment was automatically rejected or fired with no consideration of individual qualifications, demonstrated work performance, or years of service at the Authority or elsewhere.

The District Court for the Southern District of New York, in a decision later upheld by the Court of Appeals for the Second Circuit, found that the overbroad application of the Transit Authority's methadone policy to all its positions went "beyond any rational or legitimate needs" (Pet. 66a) and thereby violated the equal protection and due process clauses of the Fourteenth Amendment. The court's ruling explicitly recognized the Authority's continuing right to exclude methadone maintenance participants from all safety-sensitive jobs, as well as its right when assessing methadone maintenance participants for non-sensitive positions to take into

account any job-related factors--including their particular drug histories and records in treatment. Pet. 66a-67a.

(1) District Court Proceedings

District court proceedings consisted primarily of a thoroughgoing factual inquiry into: (1) the nature of Transit Authority employment and the needs of the Authority regarding the performance of its employees and the safety of its operations; and (2) the nature of methadone maintenance treatment and its participants' performance abilities. After extensive discovery and stipulations of fact, the court set the case down for a trial which eventually spanned some three weeks.

Plaintiffs called as witnesses many of the leading experts in the country on medical aspects of methadone maintenance and the ability of methadone maintenance participants to work. First was the Director of the President's Special Action Office for Drug Abuse Prevention and the National Institute on Drug Abuse, the coordinating agencies in the field of drug abuse treatment and research for the federal government, which for a decade has undertaken a vast commitment of resources and support to methadone maintenance as the primary treatment modality for heroin addiction. He was followed by clinicians with direct experience treating

methadone participants and by experts with specialized knowledge about methadone participants' medical condition, functional abilities, social rehabilitation, and vocational experiences.

In addition to expert witnesses, plaintiffs presented testimony from a number of major employers who had had direct experience with the work performance of methadone maintenance participants in a wide variety of jobs, including highly skilled and safety-sensitive positions. The court also heard testimony regarding the individual plaintiffs' methadone maintenance treatment records, psychomotor and intellectual functioning, and job performance abilities.

The Transit Authority called witnesses to describe the nature of Transit Authority employment, but called only one expert, a pharmacologist whose testimony the court found of "little value." Pet. 20a.

Then, at the court's request, the court and counsel conducted an eight hour inspection of the Authority's command center, clerical offices, tunnels, switching towers, stations, maintenance shops, yards and cleaning facilities to obtain a first hand view of the performance and risks involved in different job positions.

Although both parties indicated after the tour that they had concluded their proof, the court expressed a concern that the medical and other evidence so disproportionately favored plaintiffs that perhaps it had not

received a balanced and complete factual picture. This concern led to nine additional trial days to determine "whether all sides of the problems involved in the case had been thoroughly explored, or whether any negative aspects of methadone and methadone maintenance programs existed that had not been presented.... The result was an additional nine days of trial at which exhaustive effort was made to probe the relevant questions with experts of varying points of view." Pet. 21a. Twenty-two additional witnesses offered expert opinion, described in detail the operations and clinical experiences of all of New York City's major methadone programs, and explained further the Transit Authority's operations and the specific duties of its various employees.

(2) District Court Decisions

On August 6, 1975, the district court issued an opinion containing fifty-one pages of fact findings. Pet. 13a-64a. Relying on what it found to be overwhelming evidence, the court concluded that the Transit Authority's absolute methadone policy was utterly without rational justification:

> Plaintiffs have more than sustained their burden of proving that there are substantial numbers of persons on methadone maintenance who are as fit for employment as other comparable persons.
>
> No one can have the slightest doubt about the heavy responsibilities of the TA to the public,

including their duty respecting the safety of millions of persons who are carried on its subways and buses. However, in my view, the blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.

. . . .

. . . [T]he crucial point made so strongly by plaintiffs' witnesses was never convincingly challenged—that methadone as administered in the maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically. It is further proved beyond any real dispute that among the 40,000 persons in New York City on methadone maintenance (as in any comparable group of 40,000 New Yorkers), there are substantial numbers who are free of anti-social behavior and free of the abuse of alcohol or illicit drugs; that such persons are capable of employment and many are indeed employed. It is further clear that the employable can be identified by a prospective employer by essentially the same type of procedures used to identify other persons who would make good and reliable employees. . . .

This proof applies with equal, if not greater, force to those former heroin addicts who have successfully completed participation in a methadone program.

Pet. 19a-22a.

On the basis of this conclusion, the court held that the Transit Authority's policy violated the equal protection and due process clauses of the Fourteenth Amendment. The court made clear, however, that its holding left the Authority with unfettered discretion to continue

a total exclusion of methadone maintenance participants from safety-sensitive positions, as well as a wide degree of latitude in determining which methadone maintenance participants it would employ in non-sensitive positions:

> I wish to stress certain things <u>not</u> compelled by my holding. The TA is not required to hire any present or past methadone maintained person where there is a legitimate reason to question the person's ability or competence—including a legitimate reason to believe that the person is abusing illicit drugs or alcohol.... The TA is not prevented from making reasonable rules and regulations about methadone maintained persons—such as requiring satisfactory performance in a program for a period of time such as a year, or forbidding methadone maintained persons employment in sensitive categories such as that of subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment.... [T]he problem is the TA's flat ban, which goes beyond any rational or legitimate needs of the TA, and excludes persons just as qualified for employment as many who are hired by the TA.

Pet. 67a.

On January 24, 1977 the court entered a permanent injunction and judgment incorporating this limited constitutional decision. The court also ordered the Transit Authority and its defendant officers to employ two of the named plaintiffs, with back pay. Pet. 75a-80a.

(3) Court of Appeals Decisions

On June 22, 1977 the court of appeals issued an opinion affirming the district court's constitutional

ruling. Pet. 1a-8a. The court of appeals characterized the district court's opinion as "comprehensive and carefully limited." Pet. 2a. It noted that the district court had adopted a traditional "rational relationship" standard of constitutional review and had applied that standard to factual findings which the Transit Authority had not even contested.[4/]

On August 11, 1977 the Transit Authority filed a petition for rehearing containing a suggestion for a rehearing en banc directed toward the question whether under 42 U.S.C. §1983 the district court had had jurisdiction over either the Authority or its officials. On February 1, 1978 the petition was denied, unanimously. Pet. 9a.

[4/] In addition to upholding the district court's constitutional ruling, the court ordered that three individual plaintiffs who had been denied relief by the district court be reinstated in their jobs with back pay. Pet. 3a-8a.

ARGUMENT

1. The Transit Authority and its officials are subject to suit for back pay under 42 U.S.C. §1983, and for independent reasons, and the Authority's contention that the district court lacked subject matter jurisdiction under §1983 poses no question worthy of this Court's review.

Petitioners' contention that certiorari should be granted to review the failure of the court of appeals to hold that the Transit Authority and its officials are "immune from suit for both equitable and monetary relief under 42 U.S.C. §1983" (Pet. 8) is wholly without merit. Because under well-established principles the officials of the Authority are subject to suit for injunctive relief, the petitioners' argument reduces to the contention that they are not subject to suit for back pay under §1983.[5/] This contention, which attempts to place this action within the holding of Monell v. Department of Social Services, 532 F.2d 259 (2d Cir. 1976), cert. granted 429 U.S. 1071 (1977) is totally misplaced for at least three reasons.

[5/] Petitioners have expressly waived any possible claim of Eleventh Amendment immunity invocable in this action: "[N]o Eleventh Amendment claim is made in the case at bar. . . ." Pet. 12.

First, as the Transit Authority acknowledges, it is an "independent" public body. Pet. 6. Unlike the school board in Monell, it is, therefore, neither a municipality, a state, nor the alter ego of either, making it clearly a "person" subject to suit under §1983.

The Transit Authority was created by the New York State Legislature as a "body corporate and politic consistituting a public benefit corporation" (N.Y. Pub. Auth. Law §1201), autonomous in its operations. The members of the Authority are appointed by the Governor, but once appointed they serve for a fixed term of eight years. Id., §§1201.1 and 1263.1. The Authority can sue and be sued (Id., §1204.1); acquire, hold, use and dispose of equipment (Id., §1204.3); acquire real property (Id., §1204.3a); appoint officers, assign their powers, and fix their rates of compensation (Id., §1204.5); retain counsel,[6/] auditors, engineers and consultants (Id., §1204.7); and promulgate its own rules for both its internal management and the use of transit facilities under its jurisdiction (Id., §§1204.4, 1204.5-a).

6/ In this action the Transit Authority is represented by its own staff counsel, not by the Corporation Counsel of the City of New York or the Attorney General of the State of New York.

The award of back pay herein will deplete no state or municipal treasury. The operations of the Transit Authority are required to be "self-sustaining." Id., §1202.1. The Transit Authority is authorized to issue bonds and notes to meet its capital costs (Id., §§1207, 1207-a, 1207-b), and the Authority is solely responsible for those bonds and notes (Id., §1207-e). New York State has immunized itself and New York City against liability for the indebtedness of the Authority (Id., §1207-e), and provided that the debt of the Authority shall be payable only out of the Authority's funds.[7/]

While the Court of Appeals for the Second Circuit has never expressly determined whether the Transit Authority is a "person" for the purposes of §1983, see Wright v. Chief of Transit Police, 527 F.2d 1262 (2d Cir. 1976), that court has explicitly held that independent agencies of New York City or State like the Transit Authority may be "persons" within the meaning of §1983:

> While municipal corporations, that is, municipalities, are not deemed "persons" under the Civil Rights Act, see Monroe v. Pape . . . , "agencies"

7/ Although there is nothing in the record regarding the subject, petitioners imply that the City and State subsidize the Transit Authority. Pet. 11. There is, however, no provision in New York law that either the State or the City is required to provide such subsidies.

> have always been so deemed. See e.g., Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970), cert. denied 400 U.S. 853 . . . Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968).

Forman v. Community Services, Inc., 500 F.2d 1246, 1255 (2d Cir. 1974), rev'd on other grounds sub nom United Housing Foundation, Inc. v. Forma, 421 U.S. 837 (1975).

In Monell the court cited a district court case[8/] holding the Transit Authority not to be a "person." But the criterion deemed most significant by the Monell panel in determining that the Board of Education is not a "person" was its utter lack of revenue raising powers (see 532 F.2d at 263), a characteristic clearly not shared by the Transit Authority. Moreover, subsequent to its decision in Monell the court unanimously denied the Authority's petition for rehearing and suggestion for rehearing en banc. The petition was directed primarily to the question of jurisdiction under §1983, and from the court's action it must be assumed that when the court directly considered the issue it was satisfied that the Transit Authority is a "person."

The second reason that the Transit Authority's suability for back pay under §1983 raises no question

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8/ Sams v. New York State Board of Parole, 352 F.Supp. 296 (S.D.N.Y. 1972).

worthy of review is that the back pay awarded below was but a minor adjunct of the equitable relief granted. The courts below have only ordered that back pay be awarded to five plaintiffs, and the district court has not yet determined what relief will be afforded the plaintiff class.

Though state and municipal officials may not be sued in their official capacities for monetary damages under §1983, they may still be sued under that section for equitable and declaratory relief. See, e.g., Monell, 532 F.2d at 264. Courts have recognized in other contexts that a claim for back pay, when joined with a request for injunctive relief, is equitable in nature. Therefore, whether or not an action for money damages can be maintained against the Transit Authority or its officials under §1983, the limited back pay awarded below was simply a minor part of the equitable relief that the district court's established §1983 power encompasses.[9/]

9/ In Monell, which was an action solely for damages, the Second Circuit noted that the question of a court's jurisdiction to award back pay against state or local officials would be different in a case primarily equitable in nature. 532 F.2d at 267. Petitioners misleadingly quote Monell to imply that back pay can never be viewed as part of an equitable remedy. Pet. 11. Their attempt rests on omitting the critical statement: "There is no claim for reinstatement here." 532 F.2d at 267.

Finally, the question of whether the district court had jurisdiction under §1983 to award back pay against the Transit Authority is immaterial to the resolution of this case. All aspects of the judgment below rest solidly and independently on the district court's jurisdiction under 28 U.S.C. §1331.

Respondents' amended complaint alleged a violation of the Fourteenth Amendment, claimed the jurisdictionally necessary amount of damages, and invoked the district court's general federal question jurisdiction under 28 U.S.C. §1331. The district court found the Fourteenth Amendment violation and expressly rested jurisdiction on §1331. Pet. 12a. The relief ordered thus rests independently on that §1331 jurisdiction.[10/] Accordingly, this Court's review of the separate question of whether the judgment against the Transit Authority or its officials could also rest on §1983 can be of no practical significance to this litigation and is completely unnecessary.[11/]

10/ Petitioners have never claimed and cannot now object that the relief, as predicated on §1331 jurisdiction, was improper. Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), makes clear such a claim would not address the subject matter jurisdiction of the courts below and cannot therefore be raised for the first time to this Court.

As in Doyle, the allegations in respondents' amended complaint were sufficient to confer subject matter jurisdiction on the district court. See also Bell v. Hood, 327 U.S. 678 (1946). Doyle explains that any questions such as the nature and scope of an implied direct cause of action under the Fourteenth Amendment, the relief available therein, and the existence of any "person" requirement analogous to that under §1983, relate only to

(continued on next page)

whether the complaint stated a cause of action for which relief could be granted under §1331. See 429 U.S. at 278-81.

The Transit Authority has never questioned whether respondents properly stated a claim for which relief could be granted under §1331. As in Doyle, "the question as to whether the respondent[s] stated a claim for relief under §1331 is not of the jurisdictional sort which the Court raises on its own motion." 429 U.S. at 279. See also Fed.R.Civ.P. 12(h). Accordingly, it is clear that the district court had subject matter jurisdiction over the Authority and its officers under §1331, that it predicated relief independently on that jurisdiction, and that the respondents have failed to preserve any objection to the relief as ordered under §1331.

11/ It should also be noted that petitioners are named in their individual, as well as official, capacities. Regardless of the §1983 jurisdictional questions posed by petitioners, they are, therefore, individually liable under §1983 for monetary relief, subject only to the affirmative defense of "good faith." Woods v. Strickland, 420 U.S. 308 (1975) and Scheuer v. Rhodes, 416 U.S. 232 (1974) are discussed in the petition (Pet. 9-10), but the good faith defense was never asserted below.

2. In the light of clear congressional intent to provide attorneys' fees awards to prevailing parties in §1983 actions against public agencies and their officials, the award of attorneys' fees does not merit this Court's review.

The district court directed the payment to plaintiffs of counsel fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. 94-559, §2, 90 Stat. 2641, codified at 42 U.S.C. §1988.[12/] So long as the officials of the Transit Authority can be enjoined under §1983 from maintaining its unconstitutional employment policies, respondents as prevailing parties are entitled to fees under the 1976 Act. The fact that petitioners are a public agency and its officials has no effect on this entitlement.

Congress adopted the attorney's fees legislation to provide an express authorization for awards of counsel

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12/ The district court also based the attorneys' fees award on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Subsequent to its ruling that the Transit Authority's methadone policy was unconstitutional, but prior to the enactment of the 1976 Act, the court found the Authority's policy violative of Title VII for the purpose of awarding attorneys' fees. That ruling, however, is not before this Court. The court of appeals expressly refused to reach it and affirmed the attorneys' fee award solely on the basis of the 1976 Act. Pet. 3a. See Point 5 infra.

fees in §1983 cases to lawyers acting as private attorneys general. And the legislative history of the Act demonstrates the unequivocal intention of Congress that attorneys' fees be assessed against public agencies and their officials. The Senate Report stated:

> As with cases brought under 20 U.S.C. §1617 the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S. Rep. No. 94-1011, p.5. Similarly the House Report noted that:

> [G]overnment officials are frequently the defendants in cases brought under the statutes covered by [the bill]. See e.g., Brown v. Board of Education...Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves.... The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against government officials or entities.

H. R. Rep. No. 94-1558, p.7.

In the Senate, Senator Helms offered an amendment to bar awards of counsel fees against "any territory or possession thereof, or any State of the United States or any political subdivision thereof including special

purpose units of general local governments."[13/] Senator Helms urged that the amendment was necessary to "afford protection to financially pressed State and local governments." The Senate rejected the proposal by a vote of 59 to 28.[14/]

The language of the statute is equally clear. It provides for an award "in any action" to enforce §1983, and does not except from its coverage public agencies or their officials.

In short, there is no basis whatever for petitioners' contention that they are not liable for attorneys' fees under 42 U.S.C. §1988.[15/]

13/ 122 Cong. Rec. S 16433 (daily ed. Sept. 22, 1976).

14/ Id., S 16434.

15/ The attorneys' fees awarded respondents, as modified and affirmed by the court of appeals, consist solely of compensation at an hourly rate for work performed over five years of litigation. The district court had awarded an additional $50,710 "premium", which the court of appeals, heeding its own "admonition to scrutinize attorneys' fee applications with an 'eye to moderation'", eliminated. Pet. 6a.

3. The determination below that the Transit Authority's methadone policy is unconstitutional, resting on application of the traditional "rational relationship" test to unassailable fact findings, presents no question worthy of this Court's review.

As the court of appeals recognized, the district court's judgment that the Transit Authority's methadone policy violated the equal protection and due process clauses of the Fourteenth Amendment rested soundly on the well established, unintrusive "rational relationship" standard of judicial review and on extensive findings of fact supported by a substantial record. After addressing itself for fifteen days of trial to every possible concern of the Authority within speculation, the district court could not have stated its conclusion more clearly: "The blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA." (Emphasis added). Pet. 19a. Petitioners' misstatement of the opinions below and their belated attempt to reargue factual controversies conclusively resolved against them do not warrant this Court's attention.

Petitioners' assertion (Pet. 13), that the courts below applied the so-called "strict scrutiny" test of constitutionality to the Transit Authority's methadone policy is plainly wrong. Both courts expressly recognized that a public employer may exclude a class of persons

sharing some characteristic if excluding them bears but a rational relationship to some legitimate interest of the employer. The district court stated the standard of review as follows:

> A public entity such as the TA cannot bar persons from employment on the basis of criteria which have no rational relation to the demands of the jobs to be performed.

Pet. 64a (emphasis added). The court of appeals affirmed the "district court's conclusion of law... that the TA's methadone rule has 'no rational relationship to the demands of the job to be performed.'" Pet. 2a-3a. Previous decisions of this Court make clear that the equal protection and due process clauses require a public employer's eligibility criteria to meet this lenient rationality test. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976); McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976); Detroit Police Officers Ass'n v. City of Detroit, 405 U.S. 950 (1972), Aff'g mem., 385 Mich, 519, 190 N.W.2d 97, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); cf. Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) (unemployment compensation).

Neither court below so much as hinted at applying a more exacting standard of review. As the court of appeals remarked, "the legal issues were relatively simple and few." Pet. 5a. All parties urged the courts

below to test the Transit Authority's policy by the limited "rational relationship" standard, and they were joined in this regard by the United States as amicus curiae, which urged the court of appeals to affirm the district court judgment.[16/] In short, there was no controversy over the governing constitutional standard below, and there is in fact none here.[17/]

The courts below applied the rational relationship test to a factual record compellingly in respondents' favor. The rational relationship test requires neither perfect nor scientifically calibrated public employment policies, but it does demand some reasonable connection between the eligibility criterion under review and the legitimate needs of the employer. As the court of

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16/ See Brief of Plaintiffs-Appellees to the Second Circuit at 36-37; Brief of Defendants-Appellants to the Second Circuit at 18-19; Brief for the United States as Amicus Curiae to the Second Circuit at 11-12, 17.

17/ The district court noted that "there is no basic dispute among the parties as to the constitutional doctrines which apply to the present case." Pet. 64a. The court of appeals recognized the same: "There was no dispute over the governing constitutional doctrines ...." Pet. 5a. Not until its petition to this Court has the Transit Authority suggested that the district court applied an erroneous standard of review.

appeals confirmed, the voluminous record "overwhelmingly supports" the trial court's findings of fact (Pet. 2a), which in turn undercut every conceivable suggestion of a rational basis for the TA's policy.

The district court found that methadone maintenance treatment renders many former drug addicts capable of successful performance in a wide range of employment and that many persons in methadone treatment show no greater incidence of antisocial behavior than the general population. Pet. 21a. The court further found that many methadone maintenance participants are as qualified for employment in many of the Transit Authority's job categories as other persons the Authority hires. Pet. 67a. These findings demonstrated that no group characteristic could rationally justify, on grounds of safety, productivity, or any relevant basis, the Authority's across-the-board exclusion of all present and former methadone treatment participants from employment in all of its many non-safety-sensitive positions.

Additionally, the court rejected on the basis of fact findings any suggestion that the administrative burden of identifying employable methadone patients justified the blanket exclusion. Whatever the legal relevance of such burdens where they do exist, the district court found as a matter of fact that the employable could be identified through the screening procedures presently used by the TA to judge any applicant's likely work habits or

probability of theft or drug abuse. Pet. 21a; 46a. In short, the individualized consideration required by the courts below imposes no burden on the TA that it does not already assume in screening all applicants and monitoring all employees.

The TA does not and could not argue that any of the findings of fact are "clearly erroneous."[18/] So long as those findings stand, the conclusion of unconstitutionality follows inexorably under the established standards of review applied below. That conclusion presents no question worthy of this Court's review.

18/ The Transit Authority's notation that the record includes testimony challenging the efficacy of methadone programs (Pet. 15) has no place in a petition for certiorari. The overwhelming testimony was to the contrary, as were the court's findings of fact which are not challenged as "clearly erroneous."

The district court's acknowledgment of differences of opinion on the merits of treating heroin addiction with methadone, also seized upon by the Transit Authority (Pet. 15), was simply an introductory reference to differences in treatment philosophy. The comment had no relevance to and in no way detracted from the court's extensive findings on the employability and functioning of methadone patients, the only subjects relevant to the legitimate concerns of the Authority.

4. Federal legislation prohibiting employment policies that flatly exclude former addicts deprives the question of the constitutionality of the Transit Authority's methadone policy of any future practical significance.

The conclusion that the Transit Authority's methadone policy is unconstitutional rests on a sound basis in law and fact. However, lest there be any question regarding the future practical significance of the constitutional rulings below, respondents wish to note recent federal legislative developments that plainly forbid public employers from maintaining exclusionary rules like the Transit Authority's methadone policy. In the light of these developments, review of the constitutionality of the policy would have no bearing on whether it or other employers may continue such practices.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that "[n]o otherwise qualified handicapped individual...shall, solely by reason of his handicap...be subjected to discrimination under any program or activity receiving Federal financial assistance." A.1.[19/] On April 12, 1977, the Attorney General of the United States issued an opinion, based on

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19/ Citations in this form are to the Appendix annexed hereto.

extensive analysis of the legislative history, that drug addicts are "handicapped individuals" protected by the antidiscrimination provisions of §504. A.5. The consequence of this interpretation is that all public entities, such as the Transit Authority, which receive revenue sharing funds[20/] or other federal financial assistance cannot exclude otherwise qualified individuals from employment solely on the basis of their drug addiction.

On January 13, 1978 the Department of Health, Education and Welfare (HEW) issued final regulations pursuant to Exec. Order No. 11,914, 41 Fed. Reg. 17,871, (1976),[21/] which requires HEW to set government-wide standards for the implementation of §504. Under these regulations all federal agencies are required to issue their own regulations prohibiting non-job-related employment discrimination by recipients of their funds against persons with a current or prior record of handicap—including active as well as former drug addicts. A.2-A.6. Employers will further be required to make "reasonable accommodations" for active and former addicts in their workforces. A.5. HEW specifically contemplated that

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20/ The antidiscrimination provisions of §504 are applied to recipients of revenue sharing funds under 31 U.S.C. §1242.

21/ The executive order is set out at A.1-A.2.

these regulations would be applied to the transportation industry. A.3.

These statutory requirements go far beyond the simple individualized consideration of present and past methadone maintenance treatment participants ordered by the district court. Accordingly, review by this Court of the constitutional rulings below can have no impact on the present and future legality of absolute exclusionary employment practices such as the Transit Authority's policy.

5. No question of the legality of the Transit Authority's methadone policy under Title VII of the Civil Rights Act of 1964 is appropriately before this Court.

The Transit Authority has suggested that an appropriate question for review is whether its methadone policy violates Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. The suggestion is erroneous.

As the Authority states, the district court found it liable under Title VII "for the sole purpose of establishing jurisdiction to award attorneys' fees." Pet. 5. After its Title VII decision, the district court found the Transit Authority independently liable for attorneys' fees under the newly enacted Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. §1988). Id.

Given the 1976 Act as a basis for the fee award, the court of appeals expressly refused to reach the issue of Title VII liability. Pet. 3a. Review of the issue by this Court would therefore be both inappropriate and purposeless.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: New York, New York
May 18, 1978

Respectfully submitted,

DEBORAH M. GREENBERG
ERIC D. BALBER
Legal Action Center
271 Madison Avenue
New York, New York 10016

ELIZABETH BARTHOLET
MICHAEL MELTSNER
MARK C. MORRIL

Attorneys for Respondents

APPENDIX

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Rehabilitation Act of 1973, Pub. L. No. 93-112, §504, 87 Stat. 394, 29 U.S.C. §794:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976):

> Nondiscrimination in Federally Assisted Programs
>
> By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including section 301 of title 3 of the United States Code [section 301 of Title 3, The President], and as President of the United States, and in order to provide for consistent implementation within the Federal Government of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) [this section], it is hereby ordered as follows:
>
> Sec. 1. The Secretary of Health, Education, and Welfare shall coordinate the implementation of section 504 of the Rehabilitation Act of 1973, as amended [this section], hereinafter referred to as section 504 [this section], by all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity. The Secretary shall establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504 [this section]. The Secretary shall assist Federal departments and agencies to coordinate their programs and activities and shall consult

with such departments and agencies, as necessary, so that consistent policies, practices, and procedures are adopted with respect to the enforcement of section 504 [this section].

Sec. 2. In order to implement the provisions of section 504 [this section], each Federal department and agency empowered to provide Federal financial assistance shall issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary of Health, Education, and Welfare.

. . . .

Gerald R. Ford

43 Fed. Reg. 2132 (1978) (to be codified in 45 C.F.R. Part 85):

SUMMARY: This rule implements Executive Order 11914. "Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs," under which the Department of Health, Education, and Welfare is required to coordinate government-wide enforcement of section 504 of the Rehabilitation Act of 1973, as amended. In particular, the rule sets forth enforcement procedures, standards for determining which persons are handicapped, and guidelines for determining what practices are discriminatory. These procedures, standards, and guidelines are to be followed by each federal agency that provides federal financial assistance in issuing regulations implementing section 504.

EFFECTIVE DATE: January 13, 1978.

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Summary of Rule and Analysis of Comments

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It is again noted that drug addiction and alcoholism are included in the list of diseases and impairments.

. . . .

Sections 85.52-55 contain the basic requirements for the elimination of discrimination on the basis of handicap in employment. These sections should be augmented, where possible, with provisions appropriate to the programs assisted by each agency.

. . . .

One comment to §85.52, raised in the context of the transportation industry but of general applicability, inquired about the effect of this section on local, state, and federal laws that govern, in the interest of safety, driver eligibility. Local and state laws affecting the eligibility of handicapped persons for employment may continue to be applied, but only if they set standards that are job related and that do not unjustifiably disqualify such persons for particular jobs. Federal regulations as well should be reviewed to determine whether they meet this standard.

. . . .

. . .A test or other selection criterion "discriminates" if it screens out or tends to screen out handicapped persons but is not job related.

. . . .

§85.52 General prohibitions against employment discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from federal financial assistance.

(b) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(c) The prohibition against discrimination in employment applies to the following activities:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(d) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

§85.53 Reasonable accommodation.

A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

§85.54 Employment criteria.

A recipient may not use employment tests or criteria that discriminate against handicapped persons and shall ensure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.

§85.55 Preemployment inquiries.

A recipient may not conduct a preemployment medical examination or make a preemployment inquiry as to whether an applicant is a handicapped person or as to the nature or severity of a handicap except under the circumstances described in 45 CFR 84.14.

Opinion of the Hon. Griffin B. Bell, Attorney General of the United States, to Hon. Joseph A. Califano, Secretary, Department of Health, Education and Welfare, April 12, 1977:

> You have requested our opinion as to whether drug addicts and alcoholics are "handicapped individuals" within the meaning of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701 et seq.
>
> You raise this question in the context of section 504 of the Act, 29 U.S.C. § 794. . . . Executive Order 11914 designates the Department of Health, Education, and Welfare as the lead

agency in establishing standards and procedures under section 504 of the Act, and I understand that you are currently reviewing the regulations to be issued for this purpose.

The proper interpretation of the term "handicapped individual" will also affect the employment practices of the Federal Government, which is required by section 501(b) of the Act to implement an affirmative action program for hiring the handicapped, and the employment practices of Federal contractors, who are required by section 503(a) to implement similar affirmative action programs. See 29 U.S.C. §§ 791(b) and 793(a) (1975 Supp.).

It is our conclusion that alcoholics and drug addicts are "handicapped individuals" for purposes of Title V of the Act, which includes the antidiscrimination provision in section 504 that you are charged with implementing. . . . [S]ection 504 does in general prohibit discrimination against alcoholics and drug addicts in federally assisted programs solely because of their status as such, just as it prohibits discrimination solely on the basis of other diseases or conditions covered by the Act.